In mid-February 1968, Pappas returned to Las Vegas from Mexico and asked petitioner where Johnson was. Petitioner said that Johnson had "run off" and had not been heard from, that petitioner and Pappas had been "burnt again," and that they were just going to have to find another pilot (2 Tr. 309). Petitioner then called codefendant Bobby Bates, who agreed to fly the previously purchased marihuana up from Mexico (2 Tr. 310–312). On February 20, 1968, petitioner, Pappas, and Smith discussed details of the project with Bates (2 Tr. 312–315, 320, 322–323).

On February 24, 1968, following elaborate preparations in which petitioner took part (2 Tr. 324–331), Bates and Smith flew in a rented airplane from an isolated dirt airstrip near Parker Lake, Arizona, to Culiacan, where the marihuana bought by Pappas was loaded into the craft (2 Tr. 331–335). Manuel told Smith that "it was going to be a short load" because Pappas had been several hundred dollars short in his payment, but that if Pappas would come back and pay the balance he would let the "full 300 kilos" go. According to Smith: "I told Manuel if he [Pappas] wants to come back and pay you, but this is my last trip; that Mr. Pappas is taking over, as we had agreed prior to this." Manuel apparently then decided to permit the full 300-kilogram shipment to be delivered (2 Tr. 333–334). Bates and Smith then flew with the marihuana to Parker Lake, where they were arrested by agents of the Bureau of Customs on landing. During the flight Smith was at the controls until the plane reached flight altitude, after

which Bates took over and piloted the craft the rest of the way (2 Tr. 335–336).

After Bates and Smith had been "booked" at Nogales, Arizona, Bates (who in the meantime had also agreed to cooperate with the agents) flew with Smith and a Customs agent to Boulder City, Nevada. From there Bates and Smith, alone, followed by the Customs agents in another aircraft, flew the plane carrying the marihuana to North Las Vegas Air Terminal. Smith there called Pappas and told him that he and Bates had landed. Fifteen minutes later petitioner and Pappas arrived in petitioner's automobile and were arrested after they had commenced unloading the marihuana from the airplane into the car (1 Tr. 23–26, 31; 2 Tr. 336–340; 3 Tr. 471–473, 479–483).

2. After resting its case, the government, noting that defense counsel might have raised the issue of entrapment by questions asked of government witnesses on cross-examination, sought leave to reopen its case for the purpose of offering evidence with respect to petitioner's and Pappas' predisposition to commit offenses of the type for which they were on trial (3 Tr. 504, 506). Following an offer of proof by the government (3 Tr. 506–507), the court requested the attorneys for petitioner and Pappas to state whether their clients proposed to rely on entrapment as a defense (3 Tr. 544–546). Without objection, the attorneys said they did and, in response to further inquiry by the court, advised that if the government had relevant evidence they preferred this to be presented before the defense presented its case (3 Tr. 548–549).

Upon being permitted to reopen its case, the government introduced evidence showing that for a period of five or six months preceding the events involved here Smith had smuggled marihuana for petitioner, Pappas, and others (3 Tr. 551–578); that petitioner and Pappas, while Smith was in jail immediately prior to the offenses involved here, had sought to induce Smith's wife, a native of Mexico, to assist them in smuggling marihuana from Mexico in exchange for their arranging to secure Smith's release on bail (3 Tr. 580–584); and that Customs Agent Diaz, the officer in charge of the investigation that led to the present prosecution, had been advised by informants other than Smith that petitioner and Pappas were engaged in marihuana smuggling (3 Tr. 593–599).

Both Pappas and petitioner thereafter took the stand in their own defense. Pappas testified (in substance) that Smith had entrapped him into participating in the incriminating activities (3 Tr. 621–654). Petitioner's defense was that he was entirely innocent. He stated that all of his activities, about which the prosecution's witnesses had testified, had been performed simply as favors to Pappas and that he was the innocent victim of circumstantial evidence (3 Tr. 655–680). The issue of entrapment was submitted to the jury (4 Tr. 814–815).

## ARGUMENT

1. Petitioner contends the evidence is insufficient to sustain his conviction (Pet. 33–38, 53–56). But as the recital indicates, the evidence was not simply sufficient, but overwhelming. With respect to the count-1

charge that he conspired to smuggle the shipment of marihuana into the United States, the government's evidence established that petitioner, far from being an innocent bystander, was, with Pappas, the central figure in the conspiracy. With respect to the count-2 charge that petitioner knowingly received, concealed, and facilitated the transportation and concealment of the marihuana after its unlawful importation, the evidence was likewise substantial. That charge was based on petitioner's participation in the unloading of the marihuana from the plane to his automobile at the North Las Vegas Air Terminal following its unlawful importation. It is immaterial that Bates, who together with Smith had flown the marihuana into the United States, had been arrested prior to the events at the Air Terminal and was cooperating with the government agents at that time. While the conspiracy had then come to an end so far as Bates was concerned, that did not affect the character of the marihuana as unlawfully imported contraband smuggled with petitioner's knowledge. Cf. *Pederson* v. *United States*, 392 F. 2d 41, 43–44 (C.A. 9); *United States* v. *Gould*, 419 F. 2d 825, 827 (C.A. 9); *Haynes* v. *United States*, 319 F. 2d 620 (C.A. 5), certiorari denied, 375 U.S. 885. In any event, since petitioner's sentence on count 2 runs concurrently with his sentence on the conspiracy count, there is no need for further review of the count-2 conviction. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

2. As to petitioner's contention that he was entrapped as a matter of law (Pet. 38–45), there was no evidence that informant Smith lured or enticed petitioner into committing an offense he would otherwise not have attempted—the essence of the defense of entrapment (*Lopez* v. *United States*, 373 U.S. 427, 434–436; *Sherman* v. *United States*, 356 U.S. 369, 376; *Masciale* v. *United States*, 356 U.S. 386; *Sorrells* v. *United States*, 287 U.S. 435, 442).[3] It is not entrapment for a government agent or informant merely to "afford opportunities or facilities for the commission" of an offense. *Sorrells* v. *United States*, *supra*, 287 U.S. at 441; *Sherman* v. *United States*, *supra*, 356 U.S. at 372; *Lopez* v. *United States*, *supra*, 373 U.S. at 436. The informant here did no more.[4]

The government is entitled to rebut a defense of entrapment by offering evidence of the accused's criminal predisposition to commit offenses of the type charged, including evidence of prior convictions for such offenses. *Sherman* v. *United States*, 356 U.S. 369, 375–376. Such predisposition evidence, absent some indication that the defense proposes to assert the defense of entrapment, would of course not normally be

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[3] Indeed, petitioner himself, in testifying, made no such claim.

[4] The record does not support the allegation, on which petitioner particularly relies (Pet. 18, 38, 43), that Smith's "credit with Manuel" was "utilized by the government" in the transaction. Pappas gave Manuel the $2,000 principal cash payment; while the record is unclear as to precisely what agreement was reached between Manuel and Smith at their final meeting, where they discussed financial arrangements for the unpaid portion of the full 300-kilogram load, it appears that any "credit" that may have been involved was extended by Manuel to Pappas and not Smith (*supra*, p. 6).

admissible. But here, as government counsel noted in his request for leave to reopen, defense counsel had indicated that they might urge the defense of entrapment. The court, upon the government's motion, recognized the problem of reconciling the defendants' right to raise the issue of entrapment without testifying and the government's right to counter by offering predisposition evidence. The court resolved the problem by requiring each defendant, through his attorney, to state whether he elected to rely on entrapment. There was no objection to the procedure and the attorneys for both petitioner and Pappas said, in response to the court's further inquiry, that they preferred the government's predisposition evidence to be presented before the defense presented its case.

3. On the occasions of his visits (at his hosts' invitation) to the Las Vegas apartment in which petitioner and Pappas resided, Smith had concealed on his person a transmitting device by which government agents stationed in another part of the building recorded the conversations that occurred in the apartment (2 Tr. 386–387, 398–399; 3 Tr. 440–441; 4 Tr. 683–691).[5] In addition, through a "suction cup with a recorder on it," attached to a telephone handset located in a Las Vegas hotel room that Smith occupied, the agents were able to record, with Smith's knowledge

[5] The agents also once recorded, on a portable tape recorder, a conversation between Smith, petitioner, Pappas, and Bates in a restaurant located at a Las Vegas golf course (3 Tr. 490–493). Although the record is unclear on the point, the making of this recording was apparently also accomplished by means of a transmitting device attached to Smith's person.

and consent, telephone calls received by Smith from, and placed by Smith to, the apartment of petitioner and Pappas (2 Tr. 384–385; 3 Tr. 441–442, 447).[6] Prior to trial, transcripts of the recorded conversations were made available to the defense by the government (Pet. 57). At trial, no recording was offered in evidence by the government as part of its case in chief, but after petitioner and Pappas had testified in their own behalf and the defense had rested, the government sought to introduce certain of the recordings in rebuttal (4 Tr. 682–694). Viewing these as possibly prejudicial to codefendants who had chosen not to testify (and as to whom the recordings were consequently not admissible for rebuttal purposes), the court declined in its discretion to admit the recordings (4 Tr. 697). As a consequence, no recording was heard by the jury.

Petitioner contends the government acted unlawfully in recording the conversations and that although

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[6] Whether there were any such conversations does not, however, clearly appear.

In addition, the agents once installed a monitoring device in a motel room they had rented (at a Holiday Inn in Los Angeles) and to which Smith and Pappas went on the occasion of their February 1968 consultation with the prospective pilot Johnson (*supra*, p. 4). Through a recording device in an adjacent room, occupied by the agents, the agents were able to record the conversation between Smith, Pappas, and Johnson. This monitoring was also accomplished with the knowledge and consent of Smith (2 Tr. 288–290, 378–380; 3 Tr. 433–435). Petitioner was not present on this occasion and so was not a party to the conversation.

no recording was introduced into evidence, he was nevertheless improperly prejudiced by the very presence of the tapes and recording devices in the courtroom and by the fact that the existence of the recordings came to the attention of the jury through interrogation of witnesses and otherwise (Pet. 26–31, 56–62). However, it was through cross-examination of Smith by defense counsel (the attorney for Isbell, but without objection by any other attorney) that the jury first became aware that the recordings in question had been made (2 Tr. 378–381, 384–387, 398–399).[7]

*United States* v. *White*, 405 F. 2d 838 (C.A. 7), certiorari granted, 394 U.S. 957, restored to calendar for reargument, 396 U.S. 1035, cannot affect petitioner's case; there the agents testified concerning the contents of conversations overheard through an electronic listening device concealed on an informant. However, in this case there was no such testimony and whether recording the conversation was, in itself, permissible, see *Lopez* v. *United States*, 373 U.S. 427, 437–440; *Rathbun* v. *United States*, 355 U.S. 107, 110, is not at issue because the contents of the recordings were not made known to the jury. Thus, there is no occasion for the Court to defer disposition of this petition.

[7] Since the government made transcripts of the tapes available to defense counsel prior to trial and since the circumstances surrounding the monitoring were made known there is plainly no occasion to remand for a district court hearing pursuant to the procedure prescribed in *Alderman* v. *United States*, 394 U.S. 165.

## CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970